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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79 - 253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the district court be affirmed on the ground that the decision of the district court is so obviously correct under the principles established by this Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927) and *Ward* v. *Village of Monroeville*, 409 U.S. 57(1972), as to warrant no further review by this Court.

OPINION BELOW

The memorandum opinion and order of the district court are not yet reported, but are set forth in Appendix B of appellants' jurisdictional statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement.

QUESTIONS PRESENTED

1. Whether section 16(e) of the Fair Labor Standards Act (hereinafter referred to as the Act), which requires civil penalties for violations of the Act's child labor provisions, violates the due process clause of the fifth amendment because it mandates sums collected as civil penalties to be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.

2. Whether, if the provision of section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the fifth amendment to the United States Constitution, and of the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*, are set forth in the appellants' jurisdictional statement.

STATEMENT

Appellee takes issue with four representations made in appellants' statement of the case in its jurisdictional statement. The Solicitor General characterizes the hearing provided by section 16(e) and its implementing regulations as a *de novo* review of the child labor civil money penalty assessment. The Department of Labor in the administrative proceeding in the case at bar argued forcefully that:

> "The exception permitted by Section 16(e) is expressly limited to whether the violations for which the penalty is imposed actually occurred. This defines the scope of the matter to be heard by the ALJ and he cannot consider matters outside the scope."
>
> (Brief for the Secretary of Labor-Post Hearing and in Support of Proposed Decision and Order, at 32.)

Addressing the implementing regulations, the Department of Labor further stated that:

> "Section 580.2 tracks the language of the Act, limiting the exception 'to the determination that the violations for which the penalty is imposed occurred.' "
>
> (*Ibid*)

The Solicitor General's characterization is obviously at variance with the Department of Labor's position.

Appellee further questions the Solicitor General's contention that:

> "Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations."
>
> (Jurisdiction Statement at 6)

This statement does not properly reflect the potential for bias inherent in the statutory scheme mandated by section 16(e). Appellants have offered no proof that section 16(e) penalties were not or could not be used to directly benefit involved Department of Labor officials in terms of over-

time compensation; additional support personnel; travel funding; more favorable consideration for promotions and other career advancement; and the like. These benefits are authorized by section 9(a) and conceded in practical terms by appellants at page 7 of their jurisdictional statement.[1]

Appellee notes that the Solicitor General has provided the amounts of penalties collected during the first three years section 16(e) was enforced as an indication of the scope of the section's impact. A more meaningful statistic is the amount of civil money penalties assessed, which total Three Million One Hundred Thirty-Three Thousand Nine Hundred Eighty-Six Dollars ($3,133,986), hardly an insubstantial amount.

Finally, appellee believes that the Solicitor General's assertion that the court below

> "... acknowledged that the assessment of penalties by the assistant regional administrator is subject to a *de novo* determination by an administrative law judge, that the Office of Administrative Law Judges receives no allotment of any portion of the child labor penalties, and that there is thus no due process violation at the administrative law judge level (App. B, *infra*, 10a)."
>
> (Jurisdictional Statement at 9)

---

[1] "In other words, while it is *theoretically possible* for the challenged provisions of 29 U.S.C. 216(e) and 9(a) to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect."

(Jurisdictional Statement at 7)
(Emphasis Added)

misstates that court's action. The language in the district court's opinion on which the Solicitor General relies does not support an assertion that *de novo* review is available. Nor does the opinion support appellants' contention that there is no due process violation at the administrative law judge level. The district court merely cited the Department of Labor's contentions as to the administrative law judges and then moved on to the clear bias it perceived at the "basic level of dispute resolution" which, regardless of any findings as to the administrative law judges, required a holding that due process had been violated.

ARGUMENT

The appellants, Ray Marshall, Secretary of Labor, *et al.*, appeal from a decision of the United States District Court for the District of Columbia declaring that section 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e) (1976), which provides that sums collected as civil penalties for violations of the Act's child labor provisions shall be applied toward reimbursement of the costs of determining violations and assessing and collecting such penalties, violates the due process clause of the fifth amendment of the United States Constitution.

In his jurisdictional statement the Solicitor General makes a full and, appellee believes, exhaustive argument for reversal by this Court of the district court's decision. In support of their position appellants make four assumptions all of which appellee contends are factually and legally incorrect. These four assumptions are summarized as follows:

1. That section 16(e) of the Act which authorizes civil penalties for violations of the Act's child labor provisions *permits but does not require* sums collected as civil penalties to be applied toward reimbursement of the cost of enforcing the child labor laws.

2. That the district court has improperly applied to officials exercising a purportedly prosecutorial function the standards of impartiality that this Court has applied to officials exercising judicial or quasi-judicial functions.

3. That the actual use of civil money penalties for child labor violations in the past and the potential use of civil money penalties collected in the future, to reimburse the bureau, service, office, division, or other agency of the Department of Labor the cost of determining the violations and assessing and collecting such penalties falls far short of creating the substantial risk of bias that violates the due process clause of the fifth amendment to the United States Constitution.

4. That the potential for bias, the appearance of bias, and actual bias can be cured and the intent of Congress can be discerned and achieved by severing the reimbursement provision of section 16(e) from the remainder of that section, thus requiring the Department of Labor to enforce the child labor laws using some other source of funds.

I. Reimbursement Of Costs Is Mandatory

The Solicitor General in his jurisdictional statement filed in this case represents the question presented as:

> "Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it *permits* sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws."
>
> (Jurisdictional Statement at 2)
> (Emphasis Added)

This is a misleading statement of the question presented. Section 16(e) affords no discretion to the Secretary of Labor as to the use of sums collected as civil penalties. Such sums "shall be" applied toward costs of enforcing the child labor laws. Section 16(e) mandates that sums collected as civil penalties be deposited to the credit of the appropriation of the division or office of the U.S. Department of Labor which supervised, determined, assessed, and collected the involved penalties.

Accordingly, in the context of the investigation of appellee, Jerrico, Inc., for alleged violations of the child labor regulations contained at 29 C.F.R. 570.35(a), reimbursement was required to be made to the Department of Labor Regional Office in Atlanta, Georgia, which supervised the investigation of Jerrico, Inc. and which assessed

the involved penalty; to the Solicitor's Office in Nashville, Tennessee, and in Washington, D.C. for the prosecution at both the administrative and district court level of Jerrico, Inc.; and to the Office of Administrative Law Judges of the U.S. Department of Labor which conducted the administrative hearing in this matter.

Whether sums were actually paid to these offices is inapposite. Section 16(e) mandates such payment, creating a clear expectation of payment for involved officials, and is therefore an unconstitutional biasing influence on the determination of child labor violations and the assessment and collection of civil money penalties.

Section 16(e) provides:

> "... [S]ums collected as penalties pursuant to this section *shall be applied* toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with § 2 of the Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9(a))"
>
> (Emphasis Added)

The language of 29 U.S.C. 9(a) referred to in section 16(e) states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of *such work shall be deposited to the credit of the appropriation* of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and *may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency* and/or to secure the special services of persons who are neither officers nor employees of the United States.
>
> (Emphasis Added)

The language of section 16(e) is capable of only one construction; the U.S. Department of Labor, which is empowered to determine, assess, and collect civil money penalties for violations of the child labor laws and regulations, must use such funds to meet their expenses in conducting such activities. Such clear unequivocal language which affects every involved office and division of the U.S. Department of Labor in the context of civil penalty assessments violates the due process clause of the fifth amendment to the United States Constitution, whether penalties are collected or not and whether funds collected are used as required by the Act or not. This is because the language of section 16(e) itself creates the appearance of the bias and the potential for bias. Assessors of penalties have the right to expect that penalties assessed and collected will be used to reimburse them for their cost of assessment in accordance with section 16(e).

On first impression, the reference in section 16(e) to section 9(a), including the title of the Act which includes section 9(a) (an Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes), gives the self-reimburse-

ment provisions of section 16(e) a false air of legitimacy in two respects. First, reference to an existing Act of Congress ordinarily indicates that the same procedures and language have been utilized. Second, the particular language of the Act referenced implies that the sums collected as civil money penalties will in some way be used in a non-biasing manner; for example, statistical studies on child labor. In point of fact, by incorporating only section 9(a) into section the Secretary of Labor is ordered to credit any sums collected as child labor civil money penalties to the appropriation of involved offices and divisions of the Department of Labor involved in determining, assessing, and collecting such sums. Section 9(a) further grants authority to the Secretary of Labor to utilize these funds:

> "... notwithstanding any other provisions of law for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."
>
> (29 U.S.C. 9(a))

As the district court noted in its decision below:

> "This procedure [reimbursement of expenses incurred] is perfectly suitable to the context for which it was originally enacted, that is, the conducting of studies by the Department of Labor, which has greater resources and capacity to conduct such studies than most private entities. The transplanting of such a scheme, however, to the context of assessment of civil money penalties, which involves important rights of alleged violat-

> ors of the child labor laws, creates a situation in which bias may creep into the decision of the regional officials who impose those penalties."
>
> (Jurisdictional Statement, App. B at 12a)

The Solicitor General does not dispute the uniqueness of this scheme of reimbursement, citing no comparable provision. As the district court correctly stated:

> "Section 16(e) is unique in the constellation of federal statutory procedures. No other statute provides for the crediting to enforcing agencies of civil money penalties assessed against violators."
>
> (*Id.* at 11a)

By way of contrast, another statute enforced by the U.S. Department of Labor, the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*), contains a civil money penalty provision at section 666(k) which provides:

> "(k) Civil penalties owed under this chapter *shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States* and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."
>
> (Emphasis Added)

This constitutionally appropriate civil money penalty procedure was enacted by Congress approximately four years

before section 16(e) was added to the Fair Labor Standards Act. As the district court reasoned in its decision below:

> "The more appropriate procedure is simple and constitutionally sound: pay all civil money penalty funds directly into the Treasury of the United States. To allow only the Department of Labor to deviate from such a clear procedural alternative, to the detriment of alleged violators, would be to disregard the fundamental tenets of our legal system."
>
> (Jurisdictional Statement, App. B at 11a)

The Solicitor General argues, however, that an examination of the actual distribution within the U.S. Department of Labor of sums collected as civil money penalties is necessary in order to determine whether

> " ... the statutory scheme creates a sufficient risk of personal bias to violate due process."
>
> (Jurisdictional Statement at 11)

Appellee disagrees with the need for, or relevancy of, this examination since the clear and unequivocal mandatory language of section 16(e) creates a potential for and appearance of bias in violation of the due process clause. While it may be argued that the Court has ordinarily reserved a declaration of "facial" unconstitutionality for first amendment cases (*see, e.g. NAACP* v. *Button*, 371 U.S. 415, 438 (1963)), an egregious violation of fifth amendment due process has been declared facially unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). The due process violation created by section 16(e) is as clear, unequivocal and incapable of being cured as that

found in *Aptheker* and should be struck down in the same manner.

The standard for review in instances of due process bias has been enunciated by this Court in a consistent line of authority. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) is the seminal case on the issue. The Court there stated the test as:

> " ... whether the ... situation is one which would offer *a possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."
>
> (*Id.*, at 532.)
> (Emphasis Added)

This due process principle was restated in *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972), wherein the Court held that:

> " ... *possible temptation* may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a *'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial,* [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' *Id.* [273 U.S.] at 534, 47 S. Ct., at 445."
>
> (*Id.*, at 60.)
> (Emphasis Added)

Unlike *Ward* and *Tumey*, in the instant case there is no need for this Court to examine the actual system of reimbursement, no need for the Court to determine whether the fines were used to pay the salary of the judges, or whether the executive responsibilities of the mayor, in fact, conflicted with his judicial responsibilities. Here the language of the Act mandates that the penalties collected be used to reimburse the costs of assessing and collecting such penalties. Surely those costs include the salaries of the officials assessing the fines.

There is no limitation of what costs are to be reimbursed. To the contrary, there is even express authority given to the Secretary to use the penalties to secure the special services of persons who are neither officers nor employees of the United States. Unless this court affirms the decision of the district court, the clear and unequivocal language of section 16(e) requires the Secretary to use penalties collected to reimburse the salaries of the assessors of penalties to the extent the penalties are available. Whether he in fact uses the penalties in this manner or not is immaterial.

In a slightly different context, this Court specifically noted in the case of *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) the applicability of this due process standard to administrative proceedings like those at issue herein. This Court has always been vigilant to insure that procedures in our government comport with the notions of fairness inherent in due process of law.

Perhaps the most succinct statement of this due process standard is Justice Frankfurter's admonition that "Justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), *applied in Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971) and in *In re Murchison*, 349 U.S. 133, 136 (1955). Appellee seeks no more than a restatement of these principles as they apply to

section 16(e). Despite the Solicitor General's attempts to obscure the issue, the clear requirements of section 16(e) compel this Court to dismiss this appeal as presenting no substantial issues of law or fact.

The Court in *Tumey* ruled that the involved reimbursement procedure violated due process in two respects. First, the Court found that the mayor had a pecuniary interest in the result of this judgment. (*Tumey*, *supra* at 532). Second, the Court ruled that the mayor's executive responsibilities placed the mayor in two inconsistent positions, as judge and administrator. (*Id.*, at 533-34).

Both grounds for the Court's decision in *Tumey* are equally applicable in this case. The mayor in *Tumey* may here by analogized to the Secretary of Labor and his delegates; the Secretary and his delegates have a pecuniary interest in child labor civil money penalties assessed and collected, and these same individuals occupy both administrative and judicial capacities in the context of determining, assessing, and collecting child labor civil money penalties. A clearer example of the creation of bias, or the appearance of bias than section 16(e) is difficult to imagine.

The Solicitor General, instead of arguing to these substantive issues or disputing the plain meaning of section 16(e), relies on his representation that the reimbursement scheme of section 16(e) is essentially permissive and argues that any potential for bias inherent in section 16(e) is remote (Jurisdictional Statement at 16-19). As set forth more fully below, the prospects for reimbursement of expenses and costs mandated by section 16(e) are direct and substantial.

Moreover, the argument of the Solicitor General fails to address what is perhaps the most important part of the

tripartite test enunciated by this Court in *Tumey*, the appearance of bias. The appearance of bias can be no more readily apparent than it is on the face of section 16(e), which states that penalties collected *shall* be applied toward the costs of determining the violations and assessing and collecting such penalties. Justice Frankfurter's admonition regarding the "appearance of justice" is blatantly disregarded in section 16(e). The Court's long-standing commitment to the appearance of justice requires the affirmance of the decision of the district court that section 16(e) is unconstitutional.

II. Standards Of Impartiality For Officials Exercising Judicial Functions Were Not Improperly Applied

Section 16(e) requires that sums collected as civil penalties for child labor violations shall be used to reimburse the bureau, service, office, division, or other agency of the Department of Labor for the cost of determining the violations and assessing and collecting such penalties. Section 16(e) permits a person charged with a violation to take exception within fifteen (15) days after receipt of notice thereof to the determination that the violation for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 of the United States Code and regulations promulgated by the Secretary. Under the regulations promulgated by the Secretary, this administrative hearing is conducted by the U.S. Department of Labor, Office of the Administrative Law Judges.

Section 16 (e) clearly requires that this office of the Department of Labor be reimbursed for the cost of determining child labor violations and assessing and collecting such penalties to the extent that such sums are available. The fact that penalties in the instant case were not in fact used to reimburse the Office of the Administrative Law Judges is immaterial. Unless this Court affirms the unconstitutionality of section 16 (e), penalties collected in the future can and must be used to reimburse such costs. Surely, the standards of impartiality that this Court has applied to officials exercising judicial functions must apply to an administrative law judge at a hearing held in accordance with section 554 of title 5 of the U.S. Code.

In the case at bar, the Assistant Regional Administrator in Atlanta assessed civil money penalties against appellee in excess of $100,000, which was nearly the maximum that could have been imposed under the statute. For fiscal year 1977, the year following the initial imposition of penalties in this case, the Regional Office in Atlanta was allotted $39,200 as its pro rata share of total penalties received. (Jurisdictional Statement at 8-9)

Section 16 (e) requires that the Secretary of Labor, and thus his delegate, the Assistant Regional Administrator, in determining the amount of penalties, shall consider the appropriateness of such a penalty to the size of the business of the person charged and the gravity of the violation; clearly a judicial, not a prosecutive, function. Regulations promulgated by the Secretary further requires that consideration be given, among other things, to any history of prior violations; and, any evidence of willfulness or failure

to take reasonable precautions to avoid violations (29 C.F.R. 579.5(c)). Here again these are judicial, not prosecutive, functions.

Section 16 (e) further provides that the determination of the Administrator is final unless a person charged with a violation takes exception within fifteen days after receipt of notice thereof to the determination that the violation for which the penalty is imposed occurred. Again a judicial, not prosecutive, function.

Certainly the standards of impartiality that this Court has applied to officials exercising judicial functions must apply to the Assistant Regional Administrator who in the instant case is charged with the responsibility to determine the amount of the penalties and was required to consider the gravity of the violation, any history of prior violations, any evidence of willfulness or failure to take reasonable precautions to avoid violations and whose decision is final absent an exception within fifteen (15) days after notice of an alleged violation by the person charged.

The Solicitor General argues that Assistant Regional Administrators are not adjudicators and in assessing civil money penalties they are not acting in a judicial or quasi-judicial capacity and that they are exercising what is in effect a prosecutive function. (Jurisdictional Statement at 12) This, simply stated, is not so. Prosecutors do not assess penalties. Prosecutors are not required by statute to weigh the penalty against the gravity of the violation or against evidence of willfulness. Prosecutors' decisions are not final. Such functions are those of a judge, not a prosecutor.

The Solicitor General further argues that the finality of the Assistant Regional Administrator's order is not significant in determining whether a child labor penalty assessment is a judicial function. He argues that the employer's failure to file exceptions constitutes a consent to the assessment and is no different than a defendant's failure to contest a criminal charge filed in a court by a prosecutor. (Jurisdictional Statement at footnote 10)

However, a prosecutor does not set the penalty for an uncontested charge. Penalty assessments are the function of a judge, and it is precisely that function, influenced by the potential for an actual receipt of reimbursement through civil money penalties, which is being challenged in the instant case. If the Assistant Regional Administrator's responsibility was limited to an investigation as to whether the violations had occurred, with a determination as to the amount of the penalty to be made by an impartial judge, the Administrator's role could be likened to that of a prosecutor. This was not the fact in the instant case.

The Solicitor General admits that there unquestionably are constitutional limits to the discretion and partisanship permitted of prosecutors. (Jurisdictional Statement at 15) Surely the reimbursement scheme of section 16(e) exceeds such limits. The Solicitor General cites *Withrow v. Larkin*, 421 U.S. 35 (1975) for the proposition that government attorneys may have at least some interest in the success of their cases. While *Withrow* did reject a due process claim in an instance where members of an administrative agency had both investigatory and prosecutorial functions, there was no evidence of bias or the risk of bias presented in that case. The case is, therefore, distinguishable in at least one significant respect—the

Assistant Regional Administrator here had an expectation of, and was in fact reimbursed for, his investigatory and judicial functions pursuant to section 16(e).

When this combination of activities is coupled with reimbursement from penalties collected, the apppearance of and potential for bias are unquestionably present. Moreover, the actual prosecutive arm within the Department of Labor is the Solicitor's Office. It should be noted that the Solicitor's Office received in excess of $200,000 in child labor civil money penalties as reimbursement for their costs of determining, assessing, and collecting child labor penalties.

Similarly, there must be some constitutional limit to the discretion and partisanship even of public officials performing an investigatory function. Could a law constitutionally provide that all fines collected for traffic violations shall be paid over to police officers issuing traffic citations even though an unbiased judge was available to hear traffic cases? Clearly, the answer is no. "Justice must satisfy the appearance of justice," *Offutt* v. *United States supra*, at 14. Under the reimbursement scheme of section 16(e), penalties collected must be used to reimburse the cost of the work of Compliance Officers of the Department of Labor for investigating, uncovering and charging child labor violations. How is such a scheme different from the payment of all fines collected for traffic violations to the police?

III. Child Labor Penalties Have Created and Will Continue To Create A Substantial Risk of Personal Bias

It is argued, even if the standard enunciated in *Tumey* and *Ward* is applicable to the civil penalty assessment stage of section 16(e), that the due process determination turns on whether the alleged influencing factor is sufficiently proximate and substantial to create a significant risk of bias.

In his jurisdictional statement at page 16, the Solicitor General notes this Court's distinction between *Dugan* v. *Ohio*, 277 U.S. 61 (1928) and *Ward*, *supra* 60-65, in that the mayor in *Dugan* had "no executive and exercised only judicial functions" *Dugan* at 63, and since "he receives his salary in any event whether he convicts or acquits." *Id.*, at 65. This Court held in *Dugan* that the mayor's relations to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. The facts in *Dugan*, however, can be readily distinguished from the facts in the instant case. The mayor in *Dugan* was not reimbursed for his cost of determining the violations and assessing and collecting the penalties as is required under section 16(e).

The test for remoteness as stated in *Tumey* citing Mr. Justice Cooley's work on Constitutional Limitations is that the:

> ". . . interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of

affecting the judgment of or of influencing the conduct of an individual."

(*Tumey* at 531)

The Court goes on to cite *Bonham's Case*, 8 Coke, 118 and other English precedent for the proposition that:

> " . . . [it] is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable."
>
> (*Id.* at 524)

The only exception to this test is where the costs are so small that they can be properly characterized as within the maxim *de minimis non curat lex*. (*Id.* at 531)

The Solicitor General argues that no Employment Standards Administration (ESA) official responsible for assessing child labor penalties has a personal financial stake in his decision and that there is no allegation that sums collected as civil penalties increase the salaries of the administrators who assess them. (Jurisdictional Statement at 17) This argument ignores the fact that the clear statutory language of section 16(e) anticipates the use of penalties to pay the salaries of assessors.

Section 16 (e) requires that the penalties shall be used to reimburse the cost of determining the violations and assessing and collecting such penalties in accordance with the provisions of section 9 (a) of this title. Section 9 (a) in turn requires that the sums collected be deposited to the credit of the appropriation of the office within the Department of Labor which supervised the work.

Section 9 (a) further grants the Secretary of Labor discretion in using such funds

> "notwithstanding any other provision of law for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."

Surely, the cost to be reimbursed includes the cost of salaries. Even if the Secretary did not in fact use the penalties to reimburse salaries, that fact is immaterial.

Further, the fact that other laws or regulations may have prohibited the use of penalties to directly reimburse salaries does not correct the potential for bias and the appearance of bias contained in the express statutory language of section 16 (e) which provides that the Secretary shall not be bound by such other laws or regulations.

The Solicitor General also argues that Assistant Regional Administrators have no budgetary functions, and that penalties recovered do not accrue directly to their offices. (Jurisdictional Statement at 17) This argument ignores the fact that the Assistant Regional Administrator of the Atlanta Region who initially assessed appellee's penalties participated directly in a conference of the Department of Labor's administrators and officials subsequently recorded as follows:

> " 'ACTION ITEMS DEVELOPED AT WAGE AND HOUR AREA CONFERENCE, WILLIAMSBURG, VA
> (DECEMBER 15-17, 1976)'

'4. Prepare formula for allocation of major portion of CL-CMP's (Child Labor-Civil Money Penalties) collected to the regions for furtherance of CL compliance efforts.' "

(Defendants' Answers to Plaintiff's Interrogatory No. 7 at Exhibit D.)

In light of the clear requirements of section 16 (e) mandating that penalties collected be applied to the reimbursement of the cost of assessing the penalties, the budgetary responsibilities of the assessor of the penalties is immaterial. The assessor has every right to expect that his cost of assessing penalties will be received from penalties assessed irrespective of the normal budgetary process.

The Solicitor General argues that the civil money penalties *collected* constitute a minute fraction (less than 1%) of the ESA's national budget. (Jurisdictional Statement at 17) The more relevant information is the penalties *assessed* rather than collected, particularly because under the reimbursement scheme adopted by the Department of Labor, the share allotted to the assessor depended not upon collections, but upon the amount of money expended in investigation and making assessments.[2]

[2]The U.S. Department of Labor confirmed that such a procedure was in fact being used, stating: "Funds were allocated and distributed to the bureaus, offices, services, or divisions identified in answer no. 2(c) hereof for the purpose of reimbursement of child labor obligated funds. Field allottments were made in pro rata distribution based on total obligations incurred in connection with child labor enforcement. National Office allottments were made as reimbursements of costs for administration. Transfer of funds to the Office of the Solicitor was reimbursement for costs incurred in litigation of child labor matters."
(Defendant's Answers to Plaintiff's Interrogatory No. 2(d)).

The low level of collections during the first three-year period following implementation of section 16(e) does not indicate what is to be expected in the future. Obviously, as in any bureaucratic system, the first few years of any program designed to generate revenues will be the lowest in terms of revenues actually received. While collections amounted to One Hundred Fifty-One Thousand Dollars ($151,000) (FY 76), Six Hundred Fifty Thousand Dollars ($650,000) (FY 77), and Five Hundred Ninety-Two Thousand Dollars ($592,000) (FY 78), the Department of Labor noted in its Motion to Stay the decision of the district court filed on May 17, 1979 that Two Million Six Hundred Thirty-Four Thousand Three Hundred and Eleven Dollars ($2,634,311) was then pending collection, a clear indication of the growth of the program to be expected.

The Solicitor General suggests that Assistant Regional Administrators charged with the assessment of civil money penalties may not have been aware of the reimbursement provisions of section 16(e). (Jurisdictional Statement at 18) It is inconceivable that any official charged with the responsibility of assessing civil money penalties of up to One Thousand Dollars ($1,000) per child labor violation under section 16(e) would be unaware of the reimbursement provision contained in the same section of the law.

In the instant case, the Assistant Regional Administration not only clearly indicated his awareness of the reimbursement provision[3], but also joined with other Assistant Regional Administrators of the ESA to discuss ways

[3]Deposition of Sterling B. Williams, Assistant Regional Administrator at 8—10 (January 5, 1977).

and means to fairly allocate the proceeds of their child labor investigatory and assessment activities. (Defendant's Answers to Plaintiff's Interrogatory No. 7 at Exhibit D)

In analyzing the scheme adopted by ESA for the allocation of child labor penalty funds to its Regional Offices, the Solicitor General makes a distinction between allocation in proportion not to the level of penalties initially assessed by those offices, but to the amount of money expended in investigating and prosecuting child labor violations. (Jurisdictional Statement at 18) This distinction ignores the fact that the statutory language of section 16(e) would properly permit reimbursement of penalties on either basis. Moreover, the potential for bias and appearance of bias is substantial under either allocation scheme. The amount of penalties assessed is the only practical way of measuring the effectiveness and prudence of spending time and money in investigating and prosecuting child labor violations.

As pointed out by the district court:

> "Costs of enforcing the child labor laws *e.g.*, investigations and ultimately penalty assessments, are, of course, directly related to the amounts assessed in penalties. Greater effort in uncovering violations and fining the violators leads to greater amounts of penalties assessed. Thus, the increased costs of such effort leads to the crediting of a larger share of reimbursements. The Court is persuaded that this direct and tangible relationship between reimbursement and assessment is violative of due process."
>
> (Jurisdictional Statement at 8 a)

Reimbursement on the basis of monies expended in investigating and assessing penalties would seem more susceptible to bias than reimbursement on the basis of actual collection. The scheme adopted by the Department of Labor for reimbursement rewards the aggressive assessor irrespective of the validity of his assessments. In the instant case, the Assistant Regional Administrator assessed against appellee One Hundred Three Thousand Dollars ($103,000) in civil money penalties and received from ESA for the year of the assessment Thirty-Nine Thousand Two Hundred Dollars ($39,200) as his *pro rata* share of the total penalty funds received. *(Id.* at 9 a) This constitutes two and one-half times the average share allocated to each of the Regional Offices. *(Ibid.)*

The fact that the administrative law judge subsequently reduced the assessment from One Hundred Three Thousand Dollars ($103,000) to Eighteen Thousand Five Hundred Dollars ($18,500) did not result in a reduction of the share allocated to the Atlanta Regional Office. Thus, in the instant case it would appear that the decision of the Atlanta Regional Office to spend the money investigating the payroll records of appellee with its undisputed workforce in excess of Eight Thousand Five Hundred (8,500) persons, and the assessment of One Hundred Three Thousand Dollars ($103,000) as a tangible measure of the prudence of such an investigation, obviously increased the allocation of the assessing official's office. Such a direct and clear relationship between assessment of fines and reimbursement creates a substantial risk of personal bias, clearly in violation of the due process test as enunciated in *Tumey* and *Ward.*

IV. Severence Of The Reimbursement Provisions Of Section 16(e) Will Not Cure The Appearance Of Bias, The Potential For Bias And Will Not Effect Congressional Intent.

The Solicitor General argues that the reimbursement provision of section 16 (e) is merely "incidental" to the congressional purpose in enacting the section and asks this Court to sever that reimbursement language to allow the remainder of section 16(e) to be given full force and effect. (Jurisdictional Statement at 19) Appellee maintains that severence is not appropriate inasmuch as such a step would not cure the bias here at issue nor would the separation of these provisions comport with the intent of Congress.

The biasing nature of section 16 (e) is intrinsic in the language of the section, having its effect on any one who would read the statute. Even if this Court were to sever the provisions of section 16(e) relating to penalty reimbursement, allowing the remainder of the section to be enforced, the biasing influence of the statutory language would still affect all who read the section. There is absolutely no method or means to strike down the reimbursement provision judicially and cure the appearance of bias or the potential of bias that lies within the language of the section. Only legislative action can cure this constitutional defect.

It is clear from a reading of the language of the section that Congress intended that child labor enforcement activities, and especially any increased child labor enforcement activities, were to be funded by reimbursement of the cost of such efforts from the penalties assessed. If that funding mechanism were removed, only speculation can be substituted as to what Congress might have ordained as to the maximum amount of the civil money penalties which could be assessed and the method by which current or increased child labor enforcement was to be funded.

Severence will not lie where that act would cause results not contemplated, desired, or intended by the Congress.

Implied within the Solicitor General's argument is the concept that if this Court severs the reimbursement provisions of section 16 (e), the civil money penalties collected will go to the U.S. Treasury. But how is it clear that this Court's severence of the reimbursement provision of section 16 (e), and its declaration that the reimbursement provision is unconstitutional, will result in civil money penalties being paid directly into the Treasury of the United States[4] or that Congress intended such a result? Certainly, it is conceivable that Congress would prefer to earmark the funds for other lawful purposes related to the problems of child labor.

The Solicitor General has maintained that there is "strong evidence" that Congress would have enacted section 16 (e) without the reimbursement provision rather than have no civil penalties enforcement system at all. (Jurisdictional Statement at 20) The only support offered for this contention is the general severability provision of the Act and the Solicitor General's analysis of the legislative history, which in fact contains no reference to the reimbursement provision at all. The characterization of such meager support as "strong evidence" of congressional intent strains credulity.

Assuming *arguendo* that severence is appropriate, appellee maintains that the injunction issued by the district

[4]Affidavit of Assistant Administrator Wage and Hour Division, ESA, U.S. Department of Labor, filed with appellants' Motion to Stay on May 17, 1979, indicates only that all monies collected on and after May 7, 1979 pursuant to section 16(e) are to be held in *escrow* and deposited in an account with the United States Treasury until final judicial determination and resolution of the legal issues in the instant case.

court should remain in full force and effect since payment of penalties already assessed or collected into the Treasury of the United States would do nothing to correct the bias, the potential for bias, and the appearance of bias in the procedure as found by the district court. Only actual notice of this Court's decision to sever and declare the reimbursement provision unconstitutional to all Department of Labor officials affected by the provisions of section 16(e) could eliminate the impermissable potential for bias inherent in section 16 (e). Appellee submits that neither certitude of such actual notice to involved officials nor removal of the appearance of bias created by section 16 (e) remaining in official and unofficial texts of the Act can be achieved by this Court's severence of the reimbursement portion of section 16 (e).

CONCLUSION

On the basis of the foregoing argument, the appellee's Motion to Affirm should be granted. If, however, the Court decides to deny appellee's Motion to Affirm on the basis of the arguments and evidence presented, appellee's contentions are of sufficient merit and consequence to warrant full briefing by the parties and argument before the Court. We would so request such an opportunity be granted.

Respectfully submitted,

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